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No. 91-477

In The

Supreme Court of the United States

October Term, 1991

MORONGO UNIFIED SCHOOL DISTRICT, et al.,

Petitioners,

v.

JAMES SANDS, et al.,

Respondents.

Petition For Writ Of Certiorari To The Supreme Court Of California

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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Petitioner Morongo Unified School District, et al. ("MUSD") hereby files a reply to the opposition to petition for writ of certiorari filed by respondents James Sands, et al. ("Sands"), specifically responding to the novel Article III standing question presented by Sands.[1] Sands now asserts this Court does not have jurisdiction to grant certiorari to the Supreme Court of California due to Sands' asserted "broader than Article III" state taxpayer

[1] Does the United States Supreme Court have Article III jurisdiction to grant a Petition for Certiorari in a case arising from the decision of the highest court of a state where the plaintiff proceeded under a state taxpayer standing statute which creates broader standing than Article III jurisdiction requires and the defendants have suffered no personal injury as a direct result of the decision of the state court?

standing and alleged lack of "personal injury" to MUSD. This position is directly contrary to Sands' previous assertions to the state trial court below that the respondents met both federal and state taxpayer standing requirements. Sands' characterization of its lack of Article III standing is contradicted by their own previous arguments that they have federal "municipal taxpayer" standing sufficient to meet Article III requirements. MUSD further asserts federal standing on their own behalf since MUSD, its officers, agents, servants, employees, attorneys and all other persons (e.g. students) acting in concert, or under the control and direction of the above, are now subject to all the liabilities of a permanent injunction,[2] reinstated by a state court of last resort solely upon limited federal constitutional grounds.

The theory proposed by Sands would significantly alter jurisdictional relations between this Court and state courts of last resort regarding federal constitutional decision-making. Public agency defendants would be subject to federal-state standing forum shopping, with concurrent risk of becoming subject by decision of state courts of last resort to an unreviewable permanent injunction based strictly upon open federal constitutional questions. A doctrine which leads to such fundamentally unjust results should not be adopted by this Court, particularly without full briefing and argument regarding the proposed questions presented and Sands' and MUSD's actual federal standing.

STATEMENT OF THE CASE REGARDING FEDERAL AND STATE STANDING

Sands' complaint itself alleged a violation of the First Amendment to the U.S. Constitution, (CT 7) 42 U.S.C.

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[2] (App. D at A-136-137)

Section 1983, (CT 8) and the California state constitution (CT 7-8). The complaint sought on federal grounds declaratory and injunctive relief for alleged Establishment Clause violations and to bar an alleged illegal expenditure of public funds (CT 7-8), but did not assert specific statutory or other grounds for federal or state standing. (CT 1-9) Sands did recite residency both in local towns and within MUSD, (CT 2) and liability for taxes to the County of San Bernardino and State of California. (CT 2) MUSD's opposition memorandum to Sands' motion for preliminary injunction asserted Sands lacked state and federal taxpayer standing. (CT 109-110) MUSD again asserted lack of federal taxpayer standing regarding federal questions by answer to the complaint. (CT 132) On August 26, 1987, Sands filed a motion for summary judgment which did not address state or federal taxpayer standing. (CT 147-178) On September 22, 1987, MUSD filed a cross-motion which asserted Sands lacked state and federal taxpayer standing. (CT 276-287) In its reply to MUSD's opposition to motion, Sands asserted both federal[3] and state[4] taxpayer standing by operation of case law. In the response to MUSD's motion, Sands for the first time relied upon state standing pursuant to California Code of Civil Procedure section 526(a) (CT 509-515), and refuted MUSD's federal arguments by alleging federal standing as municipal taxpayers to challenge municipal expenditures, citing controlling Ninth Circuit case

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[3] (CT 445; citing *ACLU v. City of St. Charles* 794 F.2d 265 (7th Cir. 1986), *cert. denied*, 107 S.Ct. 458 (1986))

[4] (CT 444; citing *Cohen v. Board of Supervisors* 178 Cal.App.3d 447, 454; 225 Cal.Rptr. 114 (1986))

law.[5] By minute order dated December 3, 1987, the trial court granted Sands' motion and denied MUSD's motion for summary judgment. (CT 360)

I.

THIS COURT'S PRECEDENT CITED BY SANDS DOES NOT SUPPORT THEIR NOVEL THEORY THAT BOTH PETITIONERS AND RESPONDENTS HEREIN LACK STANDING AND THIS COURT LACKS JURISDICTION

Sands primarily cites *ASARCO, Inc. v. Kadish* 490 U.S. 605 (1989) (*"ASARCO"*) and *Doremus v. Board of Education*, 342 U.S. 429 (1952) (*"Doremus"*) as denying taxpayer standing "under claims virtually identical to those presented here." (Brief in Opposition p. 4.) However, neither case directly supports the approach suggested by Sands in this particular circumstance. As set forth *infra*, *ASARCO* supports MUSD's standing. Moreover, the arguments advanced by Sands are directly contrary to those based upon federal "municipal taxpayer" standing made to the trial court below.[6] While Sands may now want to repudiate that view, the matter "retains the essentials of an adversary proceeding, involving a real, not a

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[5] (CT 515-516; citing directly and emphasizing in support of federal taxpayer standing *Grove v. Mead School District No. 354* 753 F.2d 1528, 1532 (9th Cir. 1985); including portions which discussed *Doremus v. Board of Education* 342 U.S. 429 (1952) and *Massachusetts v. Mellon* 262 U.S. 447 (1923))

[6] (CT at 515-516: "At no time, herein, have federal courts abandoned the well-established rule that *municipal* taxpayers always have standing to challenge *municipal* expenditures," citing *Grove, supra*. (emphasis in Sands' original points and authorities))

not a hypothetical controversy . . . " (*Quinn v. Millsap*, 491 U.S. 95 (1989) at 102-103; citing *Nashville, C. & St. L. R. Co. v. Wallace*, 288 U.S. 249, 264 (1933), and *ASARCO*).

Doremus concerned two state and township taxpayers' challenge to a New Jersey state statute. (*Id.* at 430.) This Court in *Doremus* explicitly noted no relation of the municipal township to the litigation. (*Id.* at 433.) Further, this Court in *Doremus* approvingly noted the "municipal taxpayer" standing doctrine set forth in *Massachusetts v. Mellon*, 262 U.S. 447 (1923). (*Id.* at 433.) The petitioner in *Doremus* was not subject to a permanent injunction. Thus, *Doremus* stands for the proposition that *state* taxpayers do not have standing to seek certiorari from this Court to assert a purely religious, non-pocketbook objection to a *state* statute.

Sands herein sought as municipal taxpayers of San Bernardino County (as well as the State of California) to ban by injunctive relief a long-standing practice of MUSD, involving specifically a school district and county in which they claimed residence and liability for taxes. Sands did not seek as state taxpayers to attack state legislation. Further, unlike *Doremus*, the party seeking certiorari is now specifically bound by a permanent injunction reinstated by a state court of last resort based solely upon federal grounds. *Doremus* simply does not mandate the broad no-standing assertion of Sands.[7]

This Court and federal appellate courts have found, and continue to discuss and find, "municipal taxpayer"

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[7] Other general standing cases cited by Sands such as *Schlesinger v. Reservist Committee to Stop the War*, 418 U.S. 208 (1974), and *Frothingham v. Mellon*, 262 U.S. 447 (1923) concern federal taxpayer standing and litigation involving federal statutes or legislative actions and are not on point.

status in cases involving alleged unconstitutional expenditures of municipal funds brought by local taxpayers.[8] Further, municipal standing appears to have raised no concerns with this Court in either *Lynch v. Donnelly*, 465 U.S. 668 (1984) (respondents were local residents and members of the American Civil Liberties Union (*Id.* at 671), their claimed municipal taxpayer status is fully set forth in *Donnelly v. Lynch* (D.R.I. 1981) 525 F.Supp. 1150 at 1153-54, the petitioners were public officers) or *County of Allegheny v. American Civil Liberties Union*, 492 U.S. 573 (1989) (the respondents were a chapter of the American Civil Liberties Union and seven local residents, a petitioner was a public agency (*Id.* at 587)).

II.

MUSD HAS ARTICLE III STANDING

ASARCO, cited by Sands, controls the issue of federal standing in favor of MUSD. When a state court has issued

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[8] (See *Brodfield v. Roberts*, 175 U.S. 291 (1899); *Everson v. Board of Education*, 330 U.S. 1 (1947); *Grove, supra*, (school library book removal, question not resolved); *Smith v. County of Albemarle, Virginia*, 895 F.2d 953, 954 (4th Cir. 1990) (religious display); *Saladin v. City of Milledgeville*, 812 F.2d 687, 691-692 (11th Cir. 1987) (city stationary and seal); *Donnelly v. Lynch* 691 F.2d 1029 (1st Cir. 1982), rev'd on other grounds 104 S.Ct. 1355 (1984) (religious display); *Hawley v. City of Cleveland*, 773 F.2d 736, 741 (6th Cir. 1985) (municipal taxpayer challenging city lease with local diocese for chapel on public property); *District of Columbia Common Cause v. District of Columbia*, 858 F.2d 1 (D.C. Cir. 1988) (municipal taxpayers challenging public funds spent opposing citizens initiative); *Gwinn Area Community Schools v. State of Michigan*, 741 F.2d 840, 844 (6th Cir. 1984) (municipal taxpayers challenging deducting federal impact aid from state payments.) See also *Grand Rapid School District v. Ball*, 473 U.S. 373, 380 fn. 5 (1985).

a judgment interpreting federal law in a case in which the plaintiffs in the original action lacked standing to sue under principles governing the federal courts, this Court may exercise its jurisdiction on certiorari if the state court judgment causes direct, specific, and concrete injury to the parties who petition for this Court's review, so long as the requisites of an Article III case or controversy are also met. (*ASARCO, supra,* 490 U.S. at 623-624.) The *Sands II* decision below of the Supreme Court of California caused MUSD direct, specific and concrete injury by way of permanent injunction. Additionally, MUSD was ordered to pay Sands' costs and reasonable attorney fees. (App. D at A-136-137.) Even if this Court believes Sands may not have had standing to initiate this action in federal court, "the case has taken on such definite shape that [petitioners] are under a defined and specific legal obligation, one which causes them direct injury." (*ASARCO, supra,* 490 U.S. at 618.) Should MUSD now allow religious invocations and benedictions to take place at a graduation ceremony, all governing board members, officers, agents, servants, employees, attorneys, and *all other persons* involved, would contravene the state court order and face a "serious and immediate threat" (*ASARCO, supra,* 490 U.S. at 618), by being subject to civil contempt proceedings which could result in a fine or loss of liberty. (See California Code of Civil Procedure section 1218.) Nevertheless, such persons would be acting in a constitutional manner under federal law, assuming *arguendo* this Court upholds the graduation practice in *Lee v. Weisman* (cert. granted March 18, 1991, ___ U.S. ___, 59 U.S.L. Week 3635, Docket No. 90-1014.) As in this matter, this Court noted in *Board of Education v. Allen,* 392 U.S. 236 (1968) that there was no doubt that the school board therein had

a "personal stake in the outcome" of the litigation, citing *Baker v. Carr*, 369 U.S. 186, 204 (1962). (*Id.* at 241.)

Furthermore, standing in this instance "turns on the nature and source of the claim asserted." (*Warth v. Seldin*, 422 U.S. 490 (1975) at 500.) Beyond the penalties of the injunction itself, the "actual or threatened injury" to MUSD is also the command of the injunction which potentially invades legal rights secured by the First Amendment of the United States Constitution. The standing inquiry then becomes whether the First Amendment provision on which the claim rests properly can be understood as granting MUSD a right to judicial relief. (*Warth, supra*, 422 U.S. at 500.) In *Warth, supra*, 422 U.S. at 500, this Court noted that when a litigant asserts the rights of third parties defensively there is no Article III standing problem. (*Id.* at 501, fn. 12)

This Court further noted that the "prudential question is governed by considerations closely related to the question of whether a person in the litigant's position would have had a right of action on the claim." (*Warth, supra*, 422 U.S. at 501, fn. 12.) Moreover, under prudential rules of standing, MUSD may assert the rights of its students. (*Akron Board of Education v. State Board of Education*, 490 F.2d 1285 at 1289-1290 (6th Cir. 1974), *cert. denied* 417 U.S. 932 (1974).) In addition, close relationships, such as that between a school board and its students, have frequently led this Court and federal appellate courts to determine that standing exists.[9] In this matter, the relationship is equivalent as all are bound by the permanent injunction.

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[9] *NAACP v. Button*, 371 U.S. 415 (1963); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925); *Akron Board of Education, supra*; *Whitley v. Wilson City Board of Education*, 427 F.2d 179 (4th Cir.

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Finally, the essential requisites of Article III "case or controversy" have been met in this instance. MUSD and Sands remain in an adverse position and "valuable legal rights . . . will be directly affected to a specific and substantial degree by the decision of the question of law." (*ASARCO, supra,* at 619 citing *Nashville, C. & St. L.R. Co., supra,* 288 U.S. 249, 261-265 (1933).) From the outset, this case has constituted a genuine concrete controversy over the constitutionality of an ongoing District practice of allowing invocations and benedictions at school graduation ceremonies, rather than an abstract dispute over the constitutionality of a statute, or uncertain or hypothetical state of facts. Proceedings below were thoroughly judicial in nature and resulted in a final judgment altering tangible legal rights, therefore constituting a cognizable "case or controversy." (*ASARCO, supra,* 490 U.S. at 619.)

CONCLUSION

California Supreme Court Chief Justice Lucus' thoughtful discussion in *Sands II* regarding deferral to this Court[10] was premised upon the ability of litigants before the state court of last resort to seek review from this Court of federal questions. As noted by the California Chief Justice:

> "Neither the rights of the parties nor the path of the law is imperiled by deferring consideration of a parallel state constitutional question. The

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1970); *Board of Education v. York* 429 F.2d 66 (10th Cir. 1970); *Brewer v. Hocksey School District No. 46,* 238 F.2d 91 (8th Cir. 1956); but see *Sierra Club v. Morton,* 405 U.S. 727 (1972).

[10] (App. A at A-45-49)

> party seeking to invalidate the state statute or practice has received a favorable decision and appropriate relief, subject to possible United States Supreme Court review of the federal questions decided. Even if review takes place, that party can reassert state constitutional grounds on remand, if necessary. Likewise, the losing party has no cause to complain – if its statute or practice is invalid under either the federal or state constitutions, relief is in order."[11]

The novel standing issue raised by Sands unfortunately serves to impair the genuine rights of one party to seek such relief and imperils "the path of the law." Assuming *arguendo* this Court upholds the traditional graduation ceremony practice in *Lee*, confusion regarding public school graduation ceremonies, detrimental to California's 1009 school districts, graduates, parents, and the public, would be the only result of a decision not to exercise certiorari to the Supreme Court of California herein based upon federal taxpayer standing. MUSD thus respectfully requests the petition for certiorari either be granted and the case set for review, or held for disposition based upon *Lee*.

Respectfully submitted,

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[11] (App. A at A-47-48)